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IN THE

Supreme Court of the United States.

October Term, 1904.

No. 119.

ISAAC M. E. ALLEN AND ANOTHER,
Plaintiffs in Error

vs.

THE ALLEGHANY COMPANY,
Defendant in Error

Brief of Allen & Co., Plaintiffs in Error.

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Supreme Court

OF THE UNITED STATES.

ISAAC N. E. ALLEN and ano.,
Plaintiffs in Error,

vs.

THE ALLEGHANY COMPANY,
Defendant in Error.

Brief of Allen & Co., Plaintiffs in Error.

The writ of error brings up for review a judgment of the New Jersey Court of Errors and Appeals (p. 37 of "Transcript"), which affirmed demurrers to two defences and affirmed judgment by direction of the Court on the trial before a jury, on a further defence.

Statement of Facts.

The "Transcript of Record" was strangely defective. It did not contain the right answer of defendants and omitted much that was before the New Jersey Court of Errors and Appeals. An "Addition to the Record" contains the omissions.

The declaration is found at page 1 of the "Transcript" and the amended answer at pages 1-6 of the "Addition to the Record."

The important papers for the United States Supreme Court are the declaration (p. 1 of "Transcript"), the answer, containing pleas 2 and 3, demurred to (pp. 1-6 of "Addition"), specification of causes of demurrer (p. 14 of "Addition"), opinion of the Supreme Court on demurrer (p. 15 of "Addition"), opinion of Court of Errors and Appeals (p. 21 of "Addition") assignments of error (p. 19 of "Addition").

The Alleghany Company is a North Carolina corporation, having its principal place of business at Scranton, Pennsylvania (11, p. 7 of "Transcript"), where most of its business is done. It also did business in the State of New York. It sold lumber to Allen & Co., who gave their promissory note. After a payment on account, Allen & Co. failed, and made a compromise with their creditors. The Alleghany Company had a representative at the meeting of creditors. He was made chairman of the meeting and was appointed one of a committee to examine into the affairs of Allen & Co. (13, p. 9 of "Transcript"). This committee recommended a compromise of 20 per cent. (Exhibit Q2, p. 10 of "Addition to Record"). On the strength of this recommendation, the other creditors accepted the compromise. The Alleghany Company's representative kept them constantly advised by letter and telegram. Having found out, by reason of his position on the committee, that there was some property standing in Mr. Allen's name in New Jersey, he caused an attachment to be made secretly, while he was still recommending the compromise to the other creditors. The fact of this attachment was not known to Allen & Co. until a few days before the expiration of the four months during which bankruptcy proceedings would be effective. The Alleghany Company made evasive replies to offers of compromise, until, through a mistake as to the date of the attachment, bankruptcy proceedings were too late.

The four defences pleaded are as follows (p. 1-6 of "Addition to Record"):

1. General denial (waived) (p. 1 of "Addition").

2. The contract was made in New York, where the plaintiff was doing business in violation of law, not having complied with the New York laws in relation to foreign corporations, filing certificates, &c. (p. 2 of "Addition.")

3. The contract was made in Pennsylvania, where the plaintiff was doing business in violation of law, not having complied with the Pennsylvania laws in relation to foreign corporations filing certificates, &c. (p. 3 of "Addition.")

4. The Alleghany Company had accepted the proposition of the creditors, had recommended its acceptance to other creditors who, relying on such recommendation, had carried out its terms, and plaintiff was therefore estopped (bottom p. 4 of "Addition").

The Alleghany Company demurred to the second and third defences. The demurrer was sustained by the Supreme Court (four judges) in an opinion found at page 15 of "Addition," in which it was held that the contracts were void in New York and Pennsylvania, and, on principles of comity, would not be enforced in New Jersey, nevertheless, as the defendants' attorney has maintained that they were void in New Jersey and had not invoked the principles of comity, the demurrers were sustained. We think this strange reasoning, and an examination of the defendants' brief shows that the Court misconstrued it. The attorney denied the alleged disclaimer.

Defendants then appealed to the New Jersey Court of Errors and Appeals (about 15 or 20 judges), and this appeal brought up for review, the demurrers sustained by the Supreme Court and the alleged errors of the Circuit Court in directing a verdict. The New Jersey Court of Errors and Appeals affirmed the courts below, and from that affirmance a writ of error was allowed to the Supreme Court of the United States by Chief Justice Gummere.

The opinion of the New Jersey Court of Errors and Appeals is found at page 21 of the "Addition." That court does not sustain the demurrers on the ground set forth by the Supreme Court. In substance, it hold that the New York law, while it admittedly *forever* forbids a recovery in the courts of the State of New York, did not, *in terms*, hold the contract *void* and, therefore, the New Jersey courts will enforce a contract that never could, either in times past or times to come, be enforced in the sister State of New York. The New York statute is new (1901); its terms are plain; but the New York Court of Appeals has never passed upon this particular statute; therefore, the New Jersey court enforces a contract admittedly unenforceable in New York.

The Court of Errors and Appeals also held that the Pennsylvania statute did render the contract void and it was, therefore, non-enforceable in New Jersey, but held that the defendants' answer was not sufficient, and, to make it insufficient, reads into it words not to be found in it.

Neither the plaintiff's "specifications of causes of demurrer" (p. 14 of "Addition"), nor the opinion of the Supreme Court (p. 15 of "Addition"), nor any brief, has suggested any insufficiency in the pleading. This point has never been argued; it was new with the New Jersey Court of Errors and Appeals, and was upon their own suggestion.

The grounds upon which the writ of error was

granted are found at page 41, 42 of the "Transcript." 119 U.S. 615, 616

The position taken by the New Jersey Court is a very serious one. If a New York contract is prohibited by the laws of the State of New York and the penalty attached to that prohibition is perpetual unenforceability by the Courts of the City of New York, it is a very serious matter if the State of New Jersey be permitted, just across the river in Jersey City, to enforce New York contracts that are prohibited to be made in the State of New York, and if made, are absolutely and forever unenforceable under the laws of that State. The New Jersey Court seems to have made a distinction between unenforceable and void contracts.

The defendants, Allen & Co., strenuously maintain that the plaintiff ought not to recover, first, in good morals, on account of its deceitful conduct at the creditors' meeting; second, because the New York statute, under the pleadings, admitted by the demurrer, makes the contract absolutely void and nonenforceable in New Jersey; third, because the contract is admittedly void in Pennsylvania and the pleading of the Pennsylvania statute and of doing business thereunder was good; the same in both pleas—New York and Pennsylvania. Allen & Co. pray, therefore, that the judgment be reversed and the demurrers sustained.

THE NEW YORK STATUTE (p. 2 of "Addition").

The New York Statute states that "no foreign "corporation * * * *shall do business* in this "State without having first procured from the Sec- "retary of State a certificate that it has complied "with all the requirements of law to authorize it "*to do business* in this State, and that the business "of the corporation to be carried on in this State "*is such as may be lawfully carried on* by a corpora- "tion incorporated under the laws of this State. "* * * *No foreign stock corporation* doing busi-

"ness in this State *shall maintain any action in* this "State *upon any contract* made by it in this State, "unless, *prior to the making of such contract,* it "shall have procured such certificate" (Amendment of 1901).

The New York Statute was formerly less stringent. Before the amendment, the law was as follows: "No foreign stock corporation, doing busi- "ness in this State without such certificate shall "maintain any action in this State upon any con- "tract made by it in the State *until it shall have "procured such certificate"* (Laws 1890, Chapter 563, §15 as amended; Laws 1892, Chapter 687).

In other words, the New York law states that no foreign corporation "*shall do business* in the State" without such a certificate, and *forever* forbids the maintaining of any action upon any contract made in the State of New York entered into in violation of the prohibition.

The present statute differs from the old New York law (and from the law in many of the States) which merely *postponed* the maintaining of an action until after the law was complied with. Under the present law, if a contract has been made before the filing of the certificate, no act of the corporation will ever be able to correct the fault and open to it the Courts of New York.

Under the old law, a debt was not due—its collection was merely postponed—until the statute was complied with. Under the new law (1901) the debt never becomes due—its collection is barred forever. This interpretation is not disputed by the New Jersey Courts.

THE PENNSYLVANIA STATUTE (p. 3 of "Addition").

The Pennsylvania statute differs from the New York statute both in wording and substance. The foreign corporation is forbidden to do "any business," as in the New York statute, but the law goes further and expressly declares such business to be

unlawful. The statute says: "*It shall not be law-*"*ful* for any such corporation to do any business "in this Commonwealth," and while the Courts of the State are not by the statute, expressly closed to the corporation doing business in violation of law, and no penalty attaches to the corporation itself, nevertheless, its agents are guilty of a misdemeanor and punishable with thirty days' imprisonment and $1,000 fine, and the Pennsylvania Courts have as effectually closed their doors upon the offending corporation as has the New York statute.

The New Jersey Court of Errors and Appeals holds that, inasmuch as the New York Court of Appeals has not specifically interpreted the new statute, the New Jersey Courts will not hold the contract void, but will enforce it, although admitting that it could not be enforced in New York.

It holds the contract void under the Pennsylvania statute, and decisions, but injects into defendant's answer words that are not there, and holds the suppositious answer insufficient.

POINT I.

The object of foreign corporation laws.

Probably every State in the Union has laws of some character imposing duties, restrictions, obligations and penalties upon foreign corporations as a condition precedent to doing business within the State. The sanctions of these statutes vary widely, from mere penalties imposed upon officers and employees to absolute prohibition upon non-conforming corporations; some make all contracts unlawful, impose penalties on officers, and forbid the use of the courts to enforce contracts. These statutes are not against public policy; they do not offend

the public conscience; every State has them; New Jersey has them. If this contract had arisen in New Jersey and the Alleghany Co. were doing business there, the contract could not be enforced there.

There is no question as to the constitutionality of these laws, providing they do not impose restrictions upon interstate commerce. A foreign corporation is not a "person" protected by the Constitution of the United States, and whether or not such corporation shall be permitted to do business at all outside of the limits of its own State is purely a matter of comity concerning which no one has a right to complain. Sometimes, when the statutes of any State are thought to be unreasonable, retaliatory statutes have been passed.

The object of this class of legislation is to impose duties, obligations, restrictions, prohibitions and penalties *upon the corporation.* They never inflict any duty, obligation, restriction, prohibition or penalty *upon the domestic citizen.* No statute has ever made it a misdemeanor for a citizen to do business with a prohibited corporation, and no statute has ever forbidden the use of its courts to a domestic citizen by reason of such statutes. All the restrictions and penalties are upon the corporation, none upon the citizen. The citizen can invoke the statute to prevent the collection of a debt, but the corporation is not permitted to invoke the statute in its own defense, thereby deriving benefit from its own wrong.

Contracts made in violation of these statutes may not be *malum in se,* but they are *malum prohibitum* and are like usurious contracts, which are not considered immoral, but are merely prohibited to certain persons and in certain places., In New York, corporations cannot plead usury, and certain transactions are exempt. The foreign corporation and the usurer only are "prohibited," the statutes do not restrict the domestic citizen or the usurer's victim; and these laws are construed differently

when applied to one or the other class. This distinction is important.

The objects of these statutes are twofold: First, in the interest of the State; second, in the interest of the citizen. They are never in the interest of the foreign corporation.

Very frequently these statutes are imposed in the interest of taxation by the state in which foreign corporations do business (as is the N. Y. Statute), and the collection of taxes is one of the first and most important functions of government. These laws are, therefore, to be liberally construed in the interest of the State.

They are also in the interest of fair play. A domestic corporation, paying taxes and doing business at home should not be required to compete with a foreign rival, which has its headquarters and all its capital invested in the same city and yet pays no taxes.

These statutes are also in the interest of the domestic citizen, who is liable to be defrauded by dealing with irresponsible corporations, or corporations that may be doing an unlawful business according to the laws of the state wherein they operate. The New York statute requires a certificate to be filed, showing that the foreign corporation is carrying on a business "such as can be lawfully carried on" in the State of New York. The writer once had occasion to collect insurance on one fire loss from about thirty companies and one of these companies was *unknown* at the post office in a town in Virginia designated as the office of the company, and it was found that this was merely a paper company and was but a *nom de plume* under which an irresponsible Chicago broker was fleecing the public.

Perhaps the most important object of these statutes is to require every foreign corporation doing business within the State to have a duly appointed agent upon whom process can be served so that the domestic citizen, having done business with the foreign corporation, will not be relegated to a dis-

tant forum to obtain justice when controversies arise.

The statutes are beneficent. They meet with the approval of legislatures, courts and the public conscience, and they should be liberally construed and cheerfully enforced.

In short, all of these statutes are in the interest of the state and the citizen, and never in the interest of the foreign corporation which asks the favor of doing business away from home. Under them a contract that may be lawful on the part of the citizen may be absolutely void as regards the corporation.

It will be remembered that, in this action, an offending corporation seeks to enforce a contract prohibited by statute.

POINT II.

The different kinds of prohibiting statutes.

One of the most lenient of thees statutes is found in Colorado, which imposes no penalty upon the corporation and no prohibition in the use of the court, and casts no reflection upon the contract itself. It merely imposes a penalty upon the agent. It has been held that the penalty is exclusive and that the contracts are not void, and may be enforced not only in Colorado, but elsewhere. As Colorado courts enforce them, of course, other courts do.

Other statutes, like those in Indiana, impose no prohibition other than to forbid the use of the domestic court *until* the required certificate shall have been filed. The Indiana courts have uniformly held that a plea of the statute is a good plea in abatement and that the foreign corporation could not recover. Yet the Indiana contract is not declared to

be unlawful; it merely *has not become due,* and the corporation can mature the contract at any time by filing the requisite certificate.

Such was formerly the statute in the state of New York. Under the present New York statute the prohibition is perpetual. Under the admissions of the demurrer the plaintiff is a foreign corporation doing business in the State of New York, and entered into this contract in that State without having filed the requisite certificate; and the plaintiff is *forever* barred from maintaining an action on the claim, because the statute provides that "no for-"eign stock corporation * * * *shall do bus-"iness in this State* without having first procured," &c. The statute first prohibits the act and then forbids maintaining any action on the prohibited contract.

The Pennsylvania statute is still more drastic. It not only provides that "no foreign corporation "*shall do any business in* this Commonwealth until," &c., but it also provides that "*it shall not* "*be lawful* for any such corporation to do *any* busi-"ness in this Commonwealth," and then makes it a misdemeanor for any agent or officer to transact any such business.

The Pennsylvania statute says nothing about prohibiting the use of its Courts for the enforcement of such prohibited contracts, but it is needless to say that the Pennsylvania Courts have determined that any contract unlawful under the terms of this statute cannot be enforced; so that, practically, the Pennsylvania statute contains everything set forth in the New York statute with the additional penalty upon the officers and agents, and a plainer statement that the business is *unlawful* as well as *prohibited.*

In Lasher vs. Stimson, 145 Pa. St., 30, the Court says: "Those terms (of the Pennsylvania law) are "not onerous, or in conflict with any constitutional "provision or rule of public policy. But they are "clearly prohibitory, and they indelibly stamp as

"*unlawful any* business transaction within the "State by a foreign corporation which has not com- "plied with them. It is only by the observance of "them that it can have a legal existence for business "purposes within this jurisdiction, or *acquire con- "tractual rights which our Courts will recognize* "Thorne vs. Ins. Co., 80 Pa., 15)."

Thorne vs. Travelers Ins. Co., 80 Pa., 15, 21 Am. Rep., 89, was an action by a foreign corporation to recover moneys collected by an agent. The Court says: "It has often been held that an action found- "ed on a transaction *prohibited* by statute *cannot be "maintained,* although a penalty be imposed for "violating the law, and it is not expressly declared "that the contract be void (Citations). * * * "It is founded on general principles of policy which "he (defendant) shall have the advantage of, *con- "trary to the real justice between the parties.* The "principle of public policy is that no Court will lend "its aid to a party who grounds his action upon an "immoral or *illegal act.*"

The construction of the Pennsylvania statute by the Pennsylvania Courts has been followed by the New Jersey Court of Errors and Appeals in this case.

"In construing the statutes of another State, the "Courts of this State must accept as conclusive, the "construction put thereon by the highest judicial "tribunal of the former State" (Watson v. Lane, 22 Vroom., 186; 23 Vroom., 550).

The New Jersey statute is not materially different from the statutes of Pennsylvania or New York. It is one of the *strong,* not one of the weak statutes like Colorado or Indiana or the old New York statute. The plaintiff could not have enforced this contract in New Jersey, if it had arisen there.

Is a contract illegal, void and unenforceable in Philadelphia, legal, valid and enforceable in Camden? It cannot be said that the Pennsylvania or

New York statutes shock the moral sense of New Jersey, for New Jersey has similar statutes.

Can the Courts of New Jersey enforce a contract made in Pennsylvania or New York that it would not enforce if made in New Jersey in similar circumstances? That is a question involved in this controversy.

POINT III.

Comity.

Private international law or "the comity of nations" is not as fixed as statute law, yet has a firm place among civilized nations and "is a part of the "law of England and of the United States, and "must be ascertained by the courts of justice as "often as such questions are presented in litiga- "tion between man and man, duly submitted to "their determination. (Hilton v. Guyot, 159 U. S., "113; Snashall v. Metropolitan R. Co., 12 D. C., "319). * * It is the recognition which one na- "tion allows within its territory to the legislative, "executive or judicial acts of another nation, hav- "ing due regard both to international duty and "convenience, and to the rights of its own citizens "or of other persons who are under the protection "of its laws" (Am. & Eng. Enc. Law, 2d Ed., Vol. 22, Title, "Private International-Law," p. 1319, from which we quote further).

It will be enforced, if such enforcement would not contravene the settled policy of the forum or be prejudicial to the interest of its citizens (Brently v. Whittemore, 4 C. E. Green Eq., 462; Watson v. Murray, 8 C. E. Green, 257).

(Page 1322) "The general rule established *ex "comitate et jure gentium,* is that the place where

"the contract was made or the *lex loci contractus*, "as it is frequently called, and *not that where the* "*action is brought*, is to be considered in expound- "ing and ENFORCING the contract.

(Page 1327) "The place of making a contract "governs as to the formalities necessary to its va- "lidity. Thus, where, by the law of the country "in which an instrument is executed, *it is invalid* "without a stamp, it will be invalid everywhere."

"As a general rule, the validity of a contract as "affected by the statutes of frauds in the various "jurisdictions is regarded as a matter pertaining "to the formal execution of the contract, and is con- "trolled by *the law of the place where the contract* "*is entered into*" (Page 1327).

(Pages 1329-30) Contracts made on Sunday, when invalid by the law of the *lex loci*, are invalid everywhere. The same is true of gambling contracts and laws relating to usury and champerty.

(The usual questions of *lex loci, lex fori, contra bonos mores*, public policy, &c., do not arise in this action as the laws and consciences of Pennsylvania. New York and New Jersey are not substantially different on the questions at issue.)

"*If a contract by a foreign corporation is not* EN- "FORCEABLE *in the State where made, because of non-* "*compliance by the corporation with the statutory* "*conditions precedent to doing business in that* "*State it has been held that the contract will not be* "ENFORCED *by the Courts of another State*" (Am. & Eng. Enc. of Law, 2 Ed., Title "Foreign Corporations, Vol. 13, p. 881").

The highest Appellate Court of Kentucky has upheld that position, and we know of no reported case that holds the contrary. Some few cases, in interpreting statutes that do not prohibit the doing of business or declare it to be unlawful, merely imposing a penalty on the agent, which penalty was held to be exclusive and not to affect the contract—have held to the contrary; but no case that we are able to find has ever enforced a contract in one

jurisdiction that was declared to be illegal, unlawful, *unenforceable* or void in another (excepting, of course, in the case of certain statutes that are *contra bonos mores,* like certain slave laws).

A leading case is Ford vs. Buckeye State Ins. Co., 6 Bush (Ky.), 133; 99 Am. Dec., 663. That action was on premium notes given in Indiana to a non-complying agent. The Indiana statute required every agent of a foreign insurance company to file a certificate, and enacted that "such foreign "corporation shall not enforce, in any courts of this "State, any contracts made by their agents * * * "*before* a compliance by such agents * * * with "the provisions of § § 1 and 2 of this Act," and a non-complying agent might be fined $50. The syllabus states:

"1. Contracts not *enforceable* in the State where "made will not be *enforced* in another State.

"2. Contracts of insurance executed in Indiana "by foreign insurance companies in violation of the "laws of, and *not enforceable* in Indiana, *will not* "*be enforced* by the courts of Kentucky. * * *

"3. * * * That as Ferry (the agent) had "failed to comply with the requirements of that "statute, *the contract could not be enforced by a* "*suit on the premium notes in Indiana and there-* "*fore the courts of Kentucky should not enforce* "*said contracts by* rendering judgment for the "amount of such premium notes." * * *

In the opinion it is said: "It is insisted, however, "for the appellees, that if said contracts could not "be enforced in the courts of Indiana, the notes "were nevertheless not absolutely void, and the ap- "pellees were entitled to a recovery upon them in "the courts of this State, notwithstanding the pro- "hibition of the Indiana statute. But it is a gen- "eral rule, applicable to the invalidity of contracts,

"that if void or illegal by the laws of the place of "the contract, they are generally held void and ille- "gal everywhere. Story on Conflict of Laws, § 243. "And where a contract is declared void, *or shown to "be illegal* by the law of the State or country where "it is made, it cannot ordinarily be *enforced* as a "valid contract in any other country: Hyde v. "Goodnow, *supra;* and unless to be performed in "some other country where the contract would be "legal, which does not appear in this case, such "contracts are universally held to be void."

The Court says in Hoyt v. Thompson, 5 N. Y., 320, at page 340: "It is well settled that a foreign "corporation may sue in the courts of this State; "and equally well settled that such suit is allowed "only by the comity existing between one State or "country and another (Bank of Augusta v. Earle, "13 Pet., 590, 591). But what kind of comity can "that be called which allows a foreign corporation "to sue here, in violation of the law of the State in "which it was created? A corporation not allowed "to sue in its own State, certainly cannot be al- "lowed, by the friendly courtesy of another, to bring "its action there. The comity which allows a for- "eign corporation to sue in ordinary cases would "forbid it in a case like the present."

In E. F. Kerwan Mfg. Co. v. Truxton, 44 Atl., 427, at page 430, the Court says: "Comity requires "us to refuse to aid them in any attempt to nullify "the laws of their own State. In Bagby v. R. R. "Co., 86 Pa. St., 291, where a receiver of a corpor- "ation had been appointed by a court of competent "jurisdiction in another State * * * the Court "said that the allowance of such attachment would "be 'to infringe comity we owe to the acts of their "'(the attaching creditors') own Courts within "'their jurisdiction. Instead of comity, this would- "'be unfriendliness, for they ask us to aid them in "'the violation of their own laws.' In Bacon v. "Horne, 123 Pa. St., 452, 16 Atl., 794 * * * the "Court say: 'The plaintiffs come into this State

"'to obtain an advantage by our law which they "'could not obtain in their own. They are seeking "'to nullify the law of their own State, and ask "'the aid of our Court to do so. This they cannot "'have. If for no other reason it is forbidden by "'public policy, and the comity which exists be-"'tween the States.' Richardson v. Forepaugh, 7 "Gray, 546, and Gilman v. Ketcham, 84 Wis., 60; "54 Mo., 395 are to the same effect."

A greater degree of comity should exist between the States of the Union than between foreign nations (Bank v. McLeod, 38 Ohio St., 174, 1843, 184).

If we interpret correctly the opinion of Judge Garrison in the Supreme Court (p. 16 of "Addition"), he broadly intimates that these demurrers would have been overruled if the question of comity had been pressed upon the argument, and the New Jersey Court of Errors and Appeals was asked to overrule these demurrers upon the question of *comity*, even if not on the contention that the contract is void—which contention is still maintained with all confidence.

However, no disclaimer of counsel could change the law of the land.

The quotation made from the brief of counsel for the plaintiffs in error in the opinion of the Supreme Court (p. 16 of "Addition") was not intended to be, and was not a waiver of the question of comity in that Court. It occurred, after the citation of a number of the cases which hold that a contract illegal at the place where it purported to be made, was not legal anywhere. This principle seems to us to be quite distinct from that of comity, and the remark was properly made in that connection. The argument for the defendant in error in the Supreme Court was not at all upon the question as to the effect which might be given to these foreign statutes, but to the question whether, on their construction, the contract was void, or whether merely subjected the corporation or its agents to the penalties provided in the act. We ask

the Supreme Court of the United States to hold that the law of comity, when properly invoked, is as binding as a United States statute; that a contract that can *never* be enforced in the forum where entered into, can never be enforced in any other forum; that an unenforceable contract is as much barred as a void contract. We do not, of course, waive the contention that the contract at issue is as much void under the New York as under the Pennsylvania or New Jersey statute.

119 U.S. 615

POINT IV.

Plaintiff and defendants are not in pari delicto.

Tracy v. Tallmadge, 14 N. Y., 162, 218, is a leading case, and, in opinions covering 56 pages, discusses learnedly several of the points presented on this writ of error. In that case, a banking corporation issues notes "which the corporation was not "authorized to make and was prohibited by statute "from issuing under a penalty." It was held that the notes being prohibited by statute were illegal and void, but that, nevertheless, the plaintiff could recover upon them because "the vender, though a "party to an illegal contract, was not *in pari delicto* "within the rule precluding a recovery against the "vendee."

We take the following extracts from the opinion: "Where the parties to a contract, prohibited by "statute, but not *malum in se*, are not *in pari delic-* "*to*, the Courts may afford the relief to the less "guilty party."

In other words, as far as the bank was concerned, the notes were illegal, because in violation of a statutory prohibition; in the hands of others the notes were good. The statute could be pleaded as *against* the bank, but not *in favor* of it.

THE COURT SAYS (AT PAGE 179): "IT HAS LONG "BEEN SETTLED THAT CONTRACTS FOUNDED UPON AN "ILLEGAL CONSIDERATION OR WHICH CONTEMPLATE "THE PERFORMANCE OF THAT WHICH IS EITHER "*malum in se* OR PROHIBITED BY SOME POSITIVE "STATUTE, ARE VOID. * * * (page 181). Un- "less, therefore, the parties are *in pari delicto* as "well as *particeps criminis,* the courts, although the "contract be illegal, will afford relief where equity "requires it, to the more innocent party. * * *

"But there are other laws which are calculated "for the *protection of the subject* against oppres- "sion, extortion, deceit, etc. If such laws are vio- "lated, and the defendant takes advantage of the "plaintiff's condition or situation, then the plaint- "iff shall recover; *and it is astonishing that the "reports do not distinguish between violation of "the one sort and the other."* * * *

(Page 190) "Where the action is *in affirmance* "of an illegal contract, the object of which is *to "enforce the performance of an engagement pro- "hibited by law,* such an action can in no case be "maintained; but where the action proceeds in dis- "affirmance of such a contract and, instead of en- "deavoring to enforce it, presumes it to be void "and seeks to prevent the defendant from retaining "the benefit which he derived from an unlawful act, "there it is consonant to the spirit and policy of "the law that he should recover."

This case of Tracy vs. Talmudge (14 N. Y., 162) has been expressly approved and its principles re-adopted by the unanimous decision of the New York Court of Appeals in a late volume of its reports (Irwin vs. Curie, 171 N. Y., 409).

In other words, the law as laid down in this leading New York case is that any act prohibited by statute *is absolutely void as against the party prohibited,* but will be enforced in favor of an innocent party who is not prohibited by the statute.

The Alleghany Company "cannot set up as a de- "fense to an action thereon that it is not authorized

"to do business in the State (Pennsylvania or New "York), because of a noncompliance with the statutory requirements" (Am. & Eng. Enc. of Law, 2nd Ed., Title "Foreign Corporations," Vol. 13, p. 878 and many citations). Neither can it take any affirmative action on the prohibited contract, and when the company comes into court and asks the State of New Jersey to enforce a contract, made unlawful either by the statutes of New Jersey, or a sister State, the Courts say: "No, we are open to the "innocent; we are closed to the guilty."

The issue in this action is: whether an offending corporation seeking to enforce a contract *forever* unenforceable in New York and Pennsylvania, can prevail in New Jersey.

POINT V.

The contract is void.

(A.) *Unenforceable contracts are void and vice versa.*

We do not recognize any difference between prohibited, illegal, unenforceable or void contracts. Any difference is metaphysical rather than practical. In law the terms are interchangeable.

As far as this action is concerned, there is no difference between *malum in se* and *malum prohibitum* contracts, because the Allegheny Company is the guilty party and is trying to enforce an illegal contract.

We take the following from the American and English Encyclopædia of Law, Vol. 15, Title "Illegal Contracts," page 932, *et seq*:

"The term 'illegal' sometimes means merely that "it lacks authority of or support from law; but "when applied to contracts, the term, in its techni-

"cal sense, imports a contract violative of common "law or statute law, or of some rule of public policy. "Such contracts have been spoken of as contracts "of 'evil tendency.'

"Strictly, they are not contracts, but rather are "unlawful agreements which are *void in their incep-* "*tion.* * * * The word 'void' when applied to "such contracts, has been said to be used in refer- "ence to the question whether there can be any *legal* "*remedy* upon such contract (*i. e.*, 'void' means 'un- "enforceable')."

(Page 935) "As a general rule, all contracts or "agreements which involve or have for their object "a violation of the law, are illegal. If the contract "stands opposed to the common or statute law, "it is equally void *ab initio* in the one case as in the "other, and no action or suit will lie to enforce "it. * * *

(Page 938) "The question in regard to the "legality of contracts in violation of law has chiefly "arisen in cases in which the contract involved or "violated some statutory prohibition. * * *

(Page 939) *Malum prohibitum* and *malum in se.* "In some early cases a distinction was taken, in "reference to the validity and enforcement of con- "tracts, between acts *mala prohibita* and acts *mala* "*in se*; but, in the words of an eminent jurist, this "'has long since been exploded. It was not founded "upon any sound principle, for it is equally unfit "that a man should be allowed to take advantage "of what the law says he ought not to do, whether "the thing be prohibited because it is against good "morals, or whether it be prohibited because it is "against the interest of the State.'"

See also Pullman Palace Car Co. vs. Central Transportation Co., 65 Fed. Rep., 164, where it is said: "It seems to be true that the distinction be- "tween *malum prohibitum* and *malum in se* (which "never had the support of just reason) has disap- "peared."

Curtis vs. Leavitt, 15 N. Y., at page 243, says:

"These bills of exchange, being payable on time, "were prohibited by the act of 1840, and were, "therefore, void."

(Page 239) "But there is, in my judgment, a "distinction between the acts of a corporation, in- "nocent in themselves, which are illegal because ex- "pressly prohibited by some positive law, and sim- "ilar acts which are void merely because they are "beyond the corporate powers of the corporation. "Illegality cannot, with grammatical propriety, be "applied to the latter. *Such acts are void because "unauthorized.* They are not strictly illegal, be- "cause not expressly prohibited by law." * * *

"It is conceded that such a contract is void, and "cannot be enforced against the corporation. * * *"

(Page 244) "The test, whether a demand con- "nected with an illegal transaction is capable of be- "ing enforced at law, is whether the plaintiff re- "quires any aid from the illegal transaction in es- "tablishing his case" (Citations).

In Leavitt vs. Palmer, 3 N. Y., 19, it was held that notes issued in violation of a statutory prohibition were void.

Tracy vs. Talmadge, 14 N. Y., 162, at page 190, says: "Where the action is in affirmance of an ille- "gal contract, the object of which is to *enforce* the "performance of an agreement *prohibited by law,* "such an action can in no case be maintained; but "where the action proceeds in disaffirmance of such "a contract, and instead of endeavoring to enforce "it, presumes it to be void and seeks to prevent the "defendant from retaining the benefit which he de- "rived from an unlawful act, there it is consonant "with the spirit and policy of the law that he should "recover. * * *

"The illegal contract itself is, of course, void, and "no part of it can be enforced." * * *

(Page 211, quoting Lord Mansfield): "In Eng- "land, tea, which has not paid duty, is prohibited, "and if sold there the contract is *null and void;* but "if sold and delivered at a place where it is not pro-

"hibited, as at Dunkirk, and an action is brought "for the price of it in England, the buyer should be "condemned to pay the price, because the original "contract was good and valid."

We take the broad ground that any contract prohibited by statute, or illegal, or unenforceable in a court of law in the State where made, is *ipso facto* void and unenforceable everywhere. In law "void" connotes "unenforceable."

(B) The present New York statute merely reaffirms the common law, i. e., under the common law any contract repugnant to the common law or any statute, was unenforceable and void.

Oneida Bank vs. Ontario Bank, 21 N. Y., 490, says: "There is, no doubt, *a principle of the com-* "*mon law,* that illegal and prohibited contracts are "void, without being so expressly declared by any "statute."

(Page 496) "There is no rule of ethics or prin- "ciple of the common law, against the issue of time "obligations by banks or bankers. The offence is, "therefore, precisely of the nature, form and pro- "portions which the Legislature have de- "clared. * * *"

(Page 498) "Now, although they are void, be- "cause in a form prohibited by law, so that no ac- "tion can be maintained upon them, they are still "capable of being used as evidence."

In Bell vs. Leggett, 7 N. Y., 178, the Court says: "All contracts or agreements which have for their "object anything which is repugnant to justice, or "against the general policy of the common law, or "contrary to the provisions of any statute, *are void.*"

Exactly the same language is used in Grey vs. Hook, 4 N. Y., 449, at page 456, quoting from Comyn.

Browning vs. Marvin, 100 N. Y., 144, was an action on a claim assigned to an attorney, and the Court says, at page 149: "The statute expressly

"forbids such a purchase when the prohibited pur-"pose is attempted to be accomplished, either di-"rectly or indirectly, by the attorney in person or "through the agency of another; and no cause of "action can arise out of a transaction thus prohibit-"ed. Wetmore vs. Hegeman, 88 N. Y., 73; Baldwin "vs. Letson, 2 Barb. Ch., 306."

Oishei vs. Lazzaronne, 15 N. Y. Supp., 933, also related to the statute against champerty and maintenance, and Judge MACOMBER said: "That no "cause of action can arise out of a transaction thus "prohibited by statute is such a plain proposition as "hardly to require the citation of authority to sup-"port it" (Citations).

And in the very old case of Nellis v. Clark, 20 Wend., 24 (1838), the Court says: "If, from the "plaintiff's own stating or otherwise, the cause of "action appears to arise *ex turpi causa* or the trans-"gression of a positive law of this country, there "the Court says he has no right to be assisted. It "is upon that ground the Court goes; not for the "sake of the defendant, but because they will not "lend their aid to such a plaintiff."

In Hunt v. Knickerbocker, 5 John. Rep., 327 (1810), the Court says: "No case, I believe, can be "found where an action has been sustained, which "goes in affirmance of an illegal contract; and "where the object of it is to enforce the perform-"ance of an engagement prohibited by law. Wher-"ever an action has been sustained against a party, "to prevent him from retaining the benefit derived "from an unlawful act the action proceeds in dis-"affirmance of the contract; and instead of endeav-"oring to enforce it presumes it to be void (2 Bl. Rep., 1073; Cowp., 197, 79P, 1 H. Bl., 65)."

The present New York statute is in affirmance of the common law, that any contract prohibited by statute is unenforceable and void. The old New York statute (interpreted by 155 N. Y., 373) was in derogation of the common law, and was repealed

on that account and for the express purpose of superseding 155 N. Y., 373.

(C) *This contract is void under the New York, New Jersey and Pennsylvania statutes.*

We are aware that there have been some conflicting opinions—principally in Colorado and the Dakotas—in interpreting this particular class of prohibiting statutes, but there has been no conflict in the decisions of Pennsylvania, New Jersey or New York under the present statute. In each State the contract is unenforceable and void. A few United States Courts have enunciated certain principles, when interpreting certain weak statutes, that have led to confusion and we ask the United States Supreme Court to bring order out of chaos.

The contract in question is either void, illegal, invalid or unenforceable; and for our purposes we do not need to draw any nice distinctions as to differences in definition. When the Alleghany Company attempts to obtain affirmative relief on a contract, entered into in violation of law, and made while doing business that is expressly declared by statute to be unlawful, such contract is, *as to the Alleghany Company*, void, unlawful and illegal, and cannot be enforced in any jurisdiction recognizing international comity.

As already suggested, what statute will constitute an act (that is *malum prohibitum*), void, unlawful or illegal will depend somewhat upon the prohibiting statute, and it is needless to say that, interpreting the various statutes under consideration, there have been conflicting decisions as to just how far each particular statute has gone in rendering the contract void or unenforceable. We take the following from the American and English Encyclopedia of Law, 2nd Ed., Title, "Foreign Corporations," Vol. 13. At page 875 it says: "Accord-"ing to some decisions if the statutes expressly de-"clare that it *shall be unlawful to do business*

"without complying with their requirements, non-
"complying corporations cannot enforce any con-
"tracts made in the domestic state. *As to them at*
"*least* such contracts are void."

(Page 876) Certain "decisions hold that if a
"*penalty* is imposed by statute for non-compli-
"ance, it must be deemed exclusive of all others.
"If the penalty is deemed sufficient by the Legisla-
"ture to effect its object the Court cannot enlarge
"it" (See the Colorado statute).

"While the view just stated is probably sup-
"ported by the weight of authority there are, never-
"theless, many decisions which are in direct con-
"flict therewith, *at least so far as the right of the*
"*corporation to enforce such contracts is concerned.*
"In one of these last mentioned decisions (Dudley
"v. Collier, 87 Ala., 433), the Court said that even
"when a statute goes no further than to impose a
"penalty for the doing of an act, a contract founded
"on such act as a consideration is *void,* although
"the statute does not pronounce it void or expressly
"prohibit it. * * * "

(Page 877) "In a number of decisions it is held
"that a statute merely prohibits the doing of
"business *before a compliance* with its conditions,
"and imposes no penalty for a violation thereof,
"contracts made by such corporations before com-
"pliance are VOID *and not enforceable by them.*
"These decisions proceed upon the theory that if
"no penalty is provided for the violation of a stat-
"ute the only construction that can give any effect
"to it is to hold contracts void."

(The Encyclopaedia then refers to those cases which only suspend the remedy until compliance.)

(At page 878 it discusses the fact that the corporation cannot set up its own violation of law as a defense.)

(Page 880) "Ii the statutes imposing conditions
"expressly declare that no suits shall be brought on
"a contract or obligation made in violation thereof,
"THERE CAN BE NO ROOM FOR ANY OTHER CONSTRUC-

"TION than that the contract will be VOID *so far as "the right of the corporation to enforce it is con- "cerned."*

To sum the matter up:

Whatever decisions there may be in relation to ineffective statutes which merely impose a penalty without tainting the contract, or which merely *postpone* enforcement until certain conditions are complied with, "there can be no room for doubt" that in every decision construing statutes as effective as those of Pennsylvania and New York, where the business transacted is expressly (1) prohibited, (2) declared to be unlawful, (3) is unenforceable in the courts, and (4) a penalty is inflicted upon the agent, such a contract is void, unlawfully, illegal and unenforceable at home and abroad "so far as the "right of the corporation to enforce it is concerned," as in the demurrers at issue.

The selling of lumber to Allen & Co., at Scranton, Pa., or at New York City, and the accepting of a note in payment therefor at Scranton or New York was "doing business in Pennsylvania or in "New York." Under the admissions of the demurrers, the cause of action arose in Pennsylvania and New York, and such "doing business" is expressly declared by statute to be prohibited and unlawful. There can be no possible question that this contract is void in so far as its enforcement by the Alleghany Company is concerned.

Whether it would be void in an action by Allen & Co. for specific performance is wholly another question, with which we do not have to deal, for the prohibiting act does not deal with the citizen. It was unlawful for the Alleghany Company to sell the lumber. It was not unlawful for Allen & Co. to buy it.

If the Court should wish to go into this matter further it is respectfully referred to the following propositions and authorities: (The next point will be found at page 43.)

See
Wiesbock Co. vs Normile Co
94 Atl. Rep. 52. June 1915

First proposition:

Where foreign corporations undertake to transact business in States where, by statutes, it is declared to be unlawful to do so without complying with their requirements, non-complying corporations cannot enforce any contracts made in said States. As to them, such contracts are void: Franklin Ins. Co. v. Louisville, &c., Co., 9 Bush. (Ky.), 591; Union C. L. Ins. Co. v. Thomas, 46 Ind., 44; Stewart v. Northampton Mut., &c., Ins. Co., 38 N. J. L., 436; Farmers, &c., Ins. Co. v. Harrah, 47 Ind., 236; Western Massachusetts Mut. Fire Ins. Co. v. Girard P. S. Co., 19 Pa. Co. Ct. Rep., 113; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn., 587; N. Y. Bldg. Ass'n v. Cannon, 99 Tenn., 344; Barber v. Boehm, 21 Nebr., 450; Seamans v. Christian Bros. Mill Co., 66 Minn., 205; Williams v. Saullin, 59 Mo. App., 30; Lycoming F. Ins. Co. v. Wright, 55 Vt., 526; Jones v. Smith, 3 Gray (Mass.), 500; Williams v. Cheney, 8 Grey (Mass.), 206; Christian v. American F. L. M. Co., 89 Ala., 198; Cincinnatti Mut. H. Ass'n v. Rosenthal, 55 Ill., 87; Ehrhardt v. Robertson, 78 Mo. App., 404; State v. Bridgge, 116 Ind., 55; Pennington v. Townsend, 7 Wend. (N. Y.), 276; Aetna Ins. Co. v. Harvey, 11 Wisconsin, 394; Lasher v. Stimson, 145 Pa. St., 30, 23 Atl., 552.

Second proposition:

A contract of a non-complying corporation is void even if the statute goes no further than to impose a penalty for the doing of an act, where the contract is founded on such act as a consideration, although the statute does not pronounce it void or expressly prohibit it (Dudley v. Collier, 87 Ala., 433; Aetna Ins. Co. v. Harvey, 11 Wis., 394).

Third proposition:

Contracts of non-complying corporations are void if the statute contains a prohibition, but imposes no penalty. British Columbia Bank v. Page, 6 Oregon, 431; *In re* Comstock, 3 Sawy (U. S.), 218; Hackeny v. Leary, 12 Oregon, 40.

Fourth proposition:

Where statutes imposing conditions expressly declare that no suit shall be brought on a contract or obligation made in violation thereof, the contract will be void so far as the right of the corporation to enforce it is concerned. New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. (N. Y.), 648; National Bank v. Phoenix Warehousing Co., 6 Hun (N. Y.), 71; De Groot v. Van Duger, 20 Wend. (N. Y.), 390; Taber v. Interstate Bldg. Assn., 91 Tex., 92.

Fifth proposition:

If a contract by a foreign corporation is *not enforceable* in the State where made, because of a non-compliance by the corporation with the statutory conditions precedent to doing business in the State, by comity, the contract will not be enforced by the Courts of another State. Ford v. Buckeye State Ins. Co., 6 Bush. (Ky.), 133; Haverhill Ins. Co. v. Truxton, 44 Atl., 427; Hoyt v. Thompson, 5 N. Y., 320; Runk v. St. John, 29 Barb., 585; Hurd v. City of Elizabeth, 41 N. J. L., 1; Bagby v. Railroad Co., 86 Pa. St., 291; Ins. Co. v. Wright, 55 Vt., 526; Bank v. McLeod, 38 Ohio St., 174; Hunt v. Insurance Co., 55 Me., 290; Metzner v. Bangs, 98 Ind., 425; Stockbridge v. Beckwith, 6 Del., Ch. 72.

Wilgus on Private Corporations, at page 1512 (1902), collates the cases in different States:

"(1) When there is a penalty:

"(a) The contract is void (citing cases, "New York, Pennsylvania and New Jersey).

"(b) Contracts are not void (citing no case "in New York, New Jersey or Pennsylvania).

"(2) When there is no penalty (no citations "from New York, Pennsylvania or New Jersey)."

We will consider, in order, the cases set forth in the opposing brief at the Court of Errors and Appeals:

1. *Kindel* vs. *Beck & P. L. Co.*, 35 Pacific Rep., 538 (amount involved $7.73). This is a decision of the Supreme Court of Colorado construing its own statute, which merely imposed a penalty on the agent. The Colorado Courts universally have held that under their statute the penalty was exclusive, and that their statute in no way affected the contract itself.

This case also holds that all statutes requiring a foreign corporation to file a certificate are unconstitutional, as interfering with interstate commerce. That this is not good law is too elementary to be discussed. The highest Courts of the different States and of the United States have held to the contrary; but see *Fritz* vs. *Palmer*, 132 U. S., 282; *Cooper Mfg. Co.* vs. *Ferguson*, 133 U. S., 727, 732, where the constitutionality of these laws is expressly upheld.

2. *Denning* vs. *State ex rel., &c.*, 23 Ind., 416. In this case an innocent *bona fide* holder of a second mortgage made by a State officer, in violation of a law which permitted State funds to be invested in first mortgages only, sought to foreclose. The Court holds: "The general rule is that the Courts "will not enforce contracts prohibited by statute. "* * * but the parties will be left without rem-"edy whenever they are in *pari delicto*. But this

"rule is not applicable where the contract is pro-
"hibited for the mere protection of *one* of the par-
"ties against an undue advantage which the other
"party is supposed to possess over him."

3. *American Insurance Co.* vs. *Wellman*, 69 Ind., 413 (Circuit). The Court held that the Indiana statute (like the old New York statute) merely *suspended* the remedy until the statute was complied with, and the answer demurred to was held good. The Indiana cases invariably hold their statute to be a good plea in abatement, and that the corporation cannot recover until the certificate is filed.

4. *Crefeld Mill* vs. *Goddard*, 69 Fed. Rep., 141 (U. S. Circuit, Southern District of New York). This case construes the old New York statute, and holds that it merely suspended the cause of action until the foreign corporation complied with the statute. The plaintiff had secured the certificate before action. Judge WALLACE says expressly at page 142: "Were it not for the last clause of the "section (since amended) undoubtedly *such con-*
"*tracts would be void*, because they would be in-
"cluded in the general prohibition against doing
"business within the State." He also says: "The
"phraseology of these statutes (similar statutes of
"other States) differs so materially from that of the
"present statute that the decisions of the Courts in
"construction of their provisions are of no material
"assistance in the present case." This opinion is an instructive brief, and there is no room for doubt that Judge WALLACE would construe this contract as absolutely void, or unenforceable, as far as the corporation is concerned, under the present New York statute.

5. *Carson Rand Co.* vs. *Stern*, 129 Mo., 381. This case construes the Missouri statute where the plaintiff had complied with the law after suit brought,

but before motion to dismiss. This case turns upon the meaning of the word "maintain" and construes the statute to read like the old New York statute.

6. *Northwestern Mutual Life Insurance Co.* vs. *Overhold,* 4 Dillon, 287 (U. S. Circuit, 1876). This case construes the Colorado statute, and holds affirmatively that other State statutes rendered the contracts void, but that the Colorado statute does not, any more than failure to publish a list of officers would invalidate a contract (See bottom page 289).

7. *Fritz* vs. *Palmer,* 132 U. S., 282. This case also construes the Colorado statute and follows the State decisions. It discusses the peculiarity of the Colorado statute at length.

Inasmuch as the Colorado statute at that time contained nothing but a penalty upon the officers, it was held that it had no more effect upon a contract than though the statute had required the company to publish annually a statement of assets.

8. *Pennypacker* vs. *Capital Insurance Co.,* 80 Iowa, 56, held every position maintained by plaintiffs in error, *i. e.,* that the prohibited insurance contract was *void to the company,* but enforceable by the innocent policy holder (See pages 60, 63).

9. *Watrous* vs. *Blair,* 33 Iowa, 58, is to the same effect.

10. *Nat. Bank of Genessee* vs. *Whitney,* 103 U. S., has no application.

11. The *Walter A. Wood Moving Co. vs. Caldwell,* 54 Ind., 276 (U. S. Circuit), construed the Indiana statute, and holds that its intent is merely to postpone the enforcement of contracts until compliance, *i. e.,* this statute is like the old New York statute.

12. *Jarvis-Conklin, &c., Trust Co.* vs. *Willhoit*, 84 Fed. Rep., 514, construes a Tennessee statute similar to the Colorado statute.

13. *Chattanooga R. & C. R. Co.* vs. *Evans*, 66 Fed. Rep., 809, ditto.

14. *Chase's Patent Elevator Co.* vs. *Boston Towboat Co.*, 152 Mass., 428, holds that a certain Massachusetts statute merely makes the stockholders individually liable. It does not apply to this case.

15. Thompson's Commentaries on Laws of Corporations, §§ 7950 to 7970, discuss the whole question. The two sections quoted in the brief have no particular application to this case.

16. *McBroom* vs. *Scottish American Land Investment Co.*, 153 U., 318, merely construes a New Mex. statute on usury.

The only other case cited is *Sullivan* vs. *Beck*, 27 Fed. Rep., 200 (District Court, Indiana). This was an action to foreclose a mortgage made three years before the Indiana statute was passed. The District Judge uses some loose language that is not sustained by his citations. This is the only case that we have found that in any way sustains the contention of the defendant in error, and the application of the law to the facts of that case was probably correct, but the loose language of this single Judge has never been followed.

Why are there no citations from the reports of N. J., Penn. or N. Y., under the present statute?

No case can be found in the reports of any State, or of the U. S., construing a statute similar to that of Penn. or N. Y., where the contract was not held to be void as to the Co. when it attempts to enforce it.

We might cite from literally scores of cases where the courts have held that the contract was void in

relation to the foreign corporation; and of this much we are certain—that no case can be found in any State interpreting a statute similar to that of Pennsylvania or New York, which enforces a contract in one State which could not be enforced in the State where the contract originated. We might quote indefinitely from cases where these contracts have been held to be absolutely void, *when attempted to be enforced by the corporation,* and this is the only proposition that we have to sustain on this appeal.

This question is settled in the State of New Jersey. In Stewart v. Northampton L. S. Co., 9 Vroom, 439, the Court construed an act to regulate the business of insurance, which act is not substantially different from the Pennsylvania statute. It provides, as does the Pennsylvania statute, that "*it shall not be lawful* for any person" to take insurance. The Court held that a non-complying foreign insurance company cannot recover for assessments levied against an insured. This case was affirmed in Northampton Mutual Live Stock Co. v. Stewart, 10 Vroom., 486.

In Columbia Fire Insurance Company v. Kinyon, 8 Vroom., 33, Mr. Justice Van Syckel, after discussing the statute above quoted, and another act of similar import, says at page 37: "The agent, there-"fore, who acts without due authority, is not only "liable to the penalty in such case prescribed, but "the contract made in contravention of the law "is itself *void, so far as concerns the right of the "foreign principal to sue upon it.*"

In Goldmark v. Magnolia Metal Co., 47 Atl. Rep., 720, N. J., the Chief Justice, in speaking of the status of foreign corporations which had not complied with Section 97 of our corporation act, said: "The Legislature prescribed the conditions under "which the foreign corporations comprised within "the statute shall be allowed to transact business "in this State. Such corporations not having com-"plied with the statute are doing business within

"the State under a legislative interdict. They are, "therefore, corporations not recognized by this "State, and are disqualified from claiming that the "business carried on by them is *lawfully* trans- "acted.

The citation of cases which have held that contracts entered into by non-conforming foreign corporations were absolutely void *as far as they were concerned might be multiplied.* We make a few selections:

Williams v. Cheney, 3 Gray, 215, was an action upon an insurance note given under similar circumstances. In his opinion in that case, Bigelow, J., after referring to the Massachusetts statutes and the company's failure to comply therewith, said: "The consideration of the notes was, therefore, a "contract on the part of the insurance company, "made through their agent, which he was *prohib-* "*ited* from making by the statutes of this Com- "monwealth. Under these circumstances, it is very "clear, upon the well settled doctrine in this Com- "monwealth, that the *payee* of the notes could main- "tain no action upon them. The contract of insur- "ance having been made in direct violation of the "statutes of this Commonwealth, the consideration "of the notes was *illegal,* and they could not be en- "forced *in the hands of the original party* (Wheeler "v. Russell, 17 Mass., 258). Courts of justice will "not lend their aid to carry into effect contracts en- "tered into by parties with a view of accomplishing "anything which is *prohibited* by law."

In Wheeler v. Russell, 17 Mass., 258, the action was brought on a promissory note, the consideration for which was the sale of shingles not of the size prescribed by statute. The statute expressly prohibited the sale of shingles not of the statutory dimensions, under the penalty of forfeiture. The action was successfully defended under the general rule that where the undertaking upon which the plaintiff relies, was either upon an unlawful consideration, or to do an unlawful act, the contract is

void; and this whether the contract be illegal, as being against the rules of the common law, or the express provisions or general policy of any particular statute. The arguments of counsel are fully reported and contain an exhaustive citation of authorities. At the conclusion of the argument the Chief Justice observed that the case had been so elaborately argued on both sides, and the points and authorities so thoroughly displayed that it was quite unnecessary for the Court to go into a formal discussion of the case. They were all of opinion that the shingles, for the price of which the note in suit was given, having been sold in direct violation of the statute, the consideration of the promise was clearly illegal, and insufficient to support it. No principle of law, his Honor added, is better settled than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law.

In Cincinnati Mutual Health Assurance Company v. Rosenthal, 55 Ill., 85, the action was brought upon a note given to the appellant for stock in the company, and for premium. The statute of Illinois provided that it should not be lawful for any agent or agents of any insurance company incorporated by any other State than that, to directly or indirectly take risks or do or transact any business of insurance in that State, without first procuring a certificate of authority from the Auditor of State. In its opinion, the Court said: "The note was made and delivered, "and the policy given and the contract consum- "mated in this State, in defiance of a law which "is so plain in terms that it can bear no construc- "tion, and which no one can misunderstand, de- "claring all such contracts *unlawful*. It says, *it "shall not be lawful* for any such agent, directly "or indirectly, to take risks, or transact any busi- "ness of insurance in this State, *until* they com- "ply with the terms prescribed in that act. To "permit the company, when they admit that they

"have disregarded all of these requirements, to re-
"cover, would be for the courts to disregard the
"clearly expressed will of the general assembly, and
"to say what it has said shall be unlawful, is and
"shall be lawful and binding. *To enforce the pay-*
"ment of this note would be, virtually, to repeal a
"plain enactment of the Legislature. When the Leg-
"islature *prohibits* an act, or declares that it shall
"be unlawful, to perform it every rule of interpre-
"tation must say that the Legislature intended to
"interpose its power to prevent the act, and, as one
"of the means of its prevention, that the Courts
"shall hold it *void.* This is as manifest as if the
"statute had declared that it should be void. To
"hold otherwise would be to give the person, or
"corporation, or individual, the same rights in en-
"forcing *prohibited* contracts, as the good citizen
"who respects and conforms to the law. To permit
"such contracts to be enforced, if not offering a
"premium to violate a law, it certainly withdraws
"a large portion of the fear that deters men from
"defying the law. To do so, places the person who
"violates the law on an equal footing with those who
"strictly observe its requirements. That this con-
"tract is *absolutely void* AS TO APPELLEE, *we enter-*
"tain no doubt. (See Munsell v. Temple, 3 Gilm.,
"93.) That Courts may have held, that when a
"statute has prohibited the doing of an act, and im-
"posed a penalty simply, the act was not void, may
"be true, but we doubt the correctness of such a con-
"struction. That the Legislature imposed, by a
"subsequent section of the act, a penalty for the
"violation of the provisions of the law, does not,
"in the remotest degree, legalize or give validity to
"the note. It but shows that the general assembly
"intended to adopt such measures as should compel
"the observance of the law. Had no penalty been
"provided, no one would have, for a moment, hesi-
"tated to say, that the note was, under this law, ut-
"terly void; and if so, why should we hold, that the
"imposition of the penalty alters, or changes in the

"slightest degree, the previously declared will, that "the act should be unlawful. In the case of Bens- "ley v. Bignold, 5 Barn. & Ald., 335, where a printer "had brought an action to recover for the price of "paper furnished, and printing a pamphlet entitled "'An Elucidation of the System of Fire and Life "Insurance,' it was held, that a recovery could not "be had, because the name of the printer, the place "of his abode, and the place where printed, were "omitted from the front page of the pamphlet, con- "trary to an Act of Parliament which prescribed a "penalty of £20 for such omission. In the case of "Law v. Hodgson, 2 Camp., 147, it was held that a "person selling bricks under the statutable size, "who thereby forfeited a penalty of twenty shill- "ings, could not recover for them. This case is also "reported in 11 East, 300. In the case of Langton "v. Hughes, 2 Maule & Selw., 593, it was held that "a druggist who sold drugs to a brewer, knowing "they were to be used contrary to the statute, in "manufacturing beer, could not recover. And Lord "Ellenborough places it upon the ground that the "statute was designed to protect the public health "and the *public revenue*. And Leblanc said, in de- "livering his opinion, that it 'is an established prin- "ciple, that the Court wil not lend its aid in order "to enforce a contract entered into with a view of "carrying into effect anything which is prohibited "by law.' It has been held, that where a person "sells goods, knowing that they are intended to be "smuggled, he is not permitted by the policy of the "law to recover on such a contract. Briggs v. Law- "rence, 3 T. R., 454; Clugus v. Punckham, 4 T. R., "466; Waymell v. Reid, 5 T. R., 599: In the decision "of these cases, a number of other adjudged cases "are referred to, which support and illustrate the "rule. And Wheeler v. Russell, 17 Mass., 258, is to "the same effect. Many other decisions could be "referred to in support of the doctrine, were it "deemed necessary. This contract on the part of "the insurance company is against the manifest

"policy of the law, *is expressly made unlawful by "the statute, and prohibited. It is, therefore, void, "and of no effect.*"

In re Comstock, 3 Sawyer, 218, contains an elaborate and able discussion of the cases on this subject and with the same result. To the same effect are Semple v. Bank of British Columbia, 5 Sawyer, 88; Rising Sun Insurance Co. v. Slaughter, 20 Ind., 520; Hoffman v. Banks, 41 Ind., 1; Union Central Life Insurance Co. v. Thomas, 46 Ind., 44; The Farmers and Merchants' Ins. Co. v. Harrah, 47 Ind., 236; Seaman v. Temple & Co. (Mich.), 63 N. W. Rep., 408; Seaman v. Zimmerman (Iowa), 59 N. W., Rep., 290; Pennsylvania Co. v. Bauerle (Ill.), 33 N. E., Rep., 166.

In Aetna Insurance Co. v. Harvey, 11 Wis., 394, it was held that "an action cannot be maintained "by a foreign insurance company upon a contract "made with the company, unless the company, has "complied with the provisions of the statute, by "making the statement of its condition, as required, "before entering into the contract. A statute which "imposes a penalty for doing an act except as "prescribed, amounts to a prohibition to do the act "otherwise, and a contract for its performance is "*void.*".

In the opinion of the Court, it is said: "It was "claimed for the plaintiff in error, that inasmuch "as the statute does not say that any policy is- "sued or note taken in violation of its provisions, "should be void, that, therefore, they should not "be so held. And that the only effect the law "would be to render the agent liable to prosecu- "tion for violating it, or to an action for damages. "But we do not see how this position can be sus- "tained, in view of the well established rule of law, *"that a contract made in violation of its statute is "void and that Courts will never lend aid to its en- "forcement.* In addition to the authorities cited "by the defendant in error, the following may be "referred to upon this point: Brackett v. Hoyt, 9

"Foster, N. H., 267; Buzton v. Hamblen, 32 Maine, "448; Bancroft v. Dumas, 21 Vt., 456; Boutwell v. "Foster, 24 *id.*, 485; Gigson v. Service, 5 Taunt., "433; 5 Barn. & Ald., 335, 2 Camp., 144, 147. And "we did not understand the counsel for the plain- "tiff in error as disputing this rule, but claiming "rather that the intent of the statute was not to "render the contracts, if made, *invalid, but only "to punish the agent.* But it seems to us that its "clear intent was to prohibit the transaction of busi- "ness by foreign or domestic insurance companies "until they had complied with its provisions. The "authorities above cited *abundantly establish* that "even where *a penalty only is imposed* for doing an "act, that amounts to a prohibition, and a *contract "for its performance is void.* And where the thing "is *positively prohibited, then* ALL AGREE that the "contract is void, and there can be no queston that "the transaction of insurance business in this State "by the agents of foreign companies, *before* the com- "pliance with its provisions, is positively prohibited. "It says expressly, that *it shall not be lawful* for "the sworn statement of its officers, on filing which "its agents are authorized to do business. And when "we consider this prohibition, and the fact that a "foreign corporation could not act in this State, "except by its agents, and that the agents are ex- "pressly prohibited, there seems no room to doubt "that the intention of the statute was to entirely "prohibit the transaction of any insurance busi- "ness in this State, until the provisions of the act "had been complied with; and this being so, the is- "suing of the policy and taking the note sued on "was a violation of the law, and the company can- "not sustain the action. It is not necessary that the "law should expressly say that a contract in viola- "tion of it shall be void; *it is sufficient for it to pro- "hibit it, and its invalidity follows as a legal con- "sequence."*

In Cary-Lombard Lumber Co. v. Thomas, 22 S. W. Rep., 743, the Supreme Court of Tennessee

held that "All contracts made by it and all busi-"ness transacted by it in Shelby County prior to "that date were illegal, and no right of property "or of action could exist in it prior to that date. "It follows that such company can have no remedy "growing out of any transaction before that date "in Shelby County, and can recover upon no con-"tract, express or implied, entered into before that "date, and is not entitled to retake or recover any "materials or lumber furnished prior to that date. "Stevenson v. Ewing, 87 Tenn., 46, 9 S. W. Rep., "230; Heworth v. Montgomery, 91 Tenn., 16, 18 "S. W. Rep., 399."

In Farrior v. New England Mortgage Security Co., 7 So. Rep., 200, the State Constitution provided that "No foreign corporation shall do busi-"ness in this State without having at least one "known place of business and an authorized agent "or agents therein." The Supreme Court of Alabama held that where a foreign corporation engaged in the business of loaning money on mortgages lends money and takes a mortgage therefor in this State in violation of the Constitution, the promise of the mortgagor to pay is void, and a bill to foreclose the mortgage cannot be maintained. In its opinion the Court says: "*Apparent injus-"tice*, it is true, *often follows* from the application "of provisions of this nature, by which contracts "are annulled for illegality, or as obnoxious to "good morals or violative of public policy, or for "repugnancy to positive statutes. But the law does "not allow this result for the benefit of either of "the offending parties as being less censurable or "more favored than the other. It only lets the "parties, who are in equal fault, severely alone, as "the surest mode of securing obedience to the au-"thority of its mandates." In Bartlett v. Vinor, 3 Carth., 252, Holt, C. J., said: "Every contract "made for or about any matter or thing which is "prohibited and made unlawful by any statute is "a *void* contract, although the statute itself does

"not mention that it shall be so, but only inflicts "a penalty on the offender, because a penalty im- "plies a prohibition, although there are no prohib- "iting words in the statute." And in Holman v. Johnson, Cowp., 243, Lord Mansfield said: "No "court will lend its aid to a man who founds his "cause of action upon an immoral or illegal act. "If, from the plaintiff's own showing, or otherwise, "the cause of action appears to arise "*ex turpi causa*, "or the transgression of a positive law, then the "Court says he has no right to be assisted." Applications of this principle have been frequent in the history of English jurisprudence.

To sum the matter up, the notion that a contract attempted to be made in one State, when void by the laws of that State, can be valid elsewhere, is a legal absurdity. The validity of a contract must always be determined by the *lex loci contractus.* For every case that can be found which interprets one of the feeble statutes, like that of Colorado, holding that the contract is enforceable, there can be 20 cases found which hold that any contract made contrary to the prohibition of an express statute is illegal and void, *as to the offending corporation.*

In these days when nearly every prominent corporation extends its business over the different States of the Union and the different nations of the globe, it would lead to inextricable confusion if one State would enforce a contract that another State has declared to be unlawful. The thousands of corporations that have been incorporated under the laws of West Virginia, having neither a director nor a stockholder who has ever been within the confines of the State, and which have never had a dollar's worth of property therein, could do business in every State of the Union, and pay taxes no where on millions of dollars invested, and, when confronted in any one State with the statute which prohibits them from doing business there, could circumvent the law by merely crossing the

border and beginning an action in a neighboring State, or could bring action in a United States Court. It is needless to say that this would soon become intolerable; and we do not believe that the State of New Jersey, which has always shown such liberality in dealing with corporations, both foreign and domestic, should assist in bringing about a state of public sentiment which might ultimately lead to retaliatory statutes which would prevent any foreign corporation from doing any business at all outside of the limits of its creation.

The New York statute prohibited the Alleghany Co. from doing business in New York *prior to* conforming to the statute and closed its Courts *forever* against a contract made in violation of the statute; that made the contract not only unenforceable, but void, not only in New York, but everywhere.

POINT VI.

The opinion of the Supreme Court (p. 15 of "Addition.")

This opinion has not been sustained on any point by the opinion of the Court of Errors and Appeals. It cites no case to sustain its opening proposition that a contract may be "unenforceable at the *locus contractus*" and yet not void elsewhere. The Court holds, apparently, that the demurrers would have been sustained on principles of comity, had not the defendant's attorney disclaimed that point (closing paragraph of Opinion, p. 18).

A careful examination of the printed briefs submitted by the defendants' attorney fails to reveal any such disclaimer, and the question of comity was pressed before the Court of Errors and Appeals.

The Assignments of Error (p. 19 of "Addition")

to Court of Errors and Appeals brought up for review the overruling of the demurrers to the second and third defenses, and the direction of a verdict at Circuit, on the trial of the first and fourth defenses, *i. e.,* all alleged errors both on demurrers and on the trial were reviewed.

POINT VII.

The opinion of the New Jersey Court of Errors and Appeals.

The opinion held by this Court is probably the only one that need be considered in the Supreme Court of the United States. Some of the positions held by it are wholly different from that of the Court below, and were not suggested in any of the respondent's briefs.

(1) In relation to the New York Statute.

(*a*) The contract is "void," but if only "unenforceable" in New York, it should not be enforced in New Jersey.

We think that the syllabus is not sufficiently strong. It states: "A contract void by the laws of "the State where made will not be enforced in this State." This is only a half truth, and is therefore the more dangerous. It seems to make a distinction between void and unenforceable contracts. There is no such distinction. The New Jersey Court nowhere claims that the contract at issue is *enforceable* in New York, now or hereafter; it admits it is not. The Court should have gone further and held: "A contract void or *unenforceable* by the "laws of the State where made, will not be enforced "in this State."

We deem it to be the law that any contract, executed in New York, between citizens of New York, or between a citizen and a foreign corporation, and prohibited by a New York statute, even though not expressly declared to be void, is void, or at least, unenforceable, and any contract unenforceable, now and forever hereafter, in the State of New York, should not be enforced in the State of New Jersey or in the United States Courts.

To hold otherwise would be not only contrary to the law of comity, which is just as binding as any other law, when properly invoked, but it would lead to friction, and, possibly, open hostility between the States. It never was the intent of the Constitution that New York should be so far deprived of its sovereignty that a claim of one of its citizens against another citizen on a contract executed in New York should be prohibited by law and unenforceable at home and yet enforceable in New Jersey, or in the United States Courts at home; and the same principle is applicable to any prohibited act either between citizens of the State of New York or a citizen and a foreign corporation. The State of New York might prohibit one of its citizens from taking usury from another and attach no penalty except that the debt should never be enforced in the Courts of New York. If, then, one of those New York citizens should go to New Jersey on an excursion and there be served with a summons, according to the reasoning of the New Jersey Court, the contract prohibited and unenforceable in New York would be enforceable in Jersey City. There is no avoiding the logic of this reasoning, and unless the Supreme Court of the United States shall forever settle this question, there is bound to be endless friction.

(b) New York Interpretation of New York Law.

The New Jersey Court avoids the real issue by saying that, as the Court of Appeals of New York has never interpreted this new statute, the New

Jersey Courts must assume that the contract is not void, although it admits that it is unenforceable in New York. We answer by saying that statutes are just as mandatory and just as plain as decisions, and that unenforceable and void contracts stand on the same platform.

However, the New Jersey Court of Errors and Appeals is wholly mistaken in its interpretation of the New York law. The first New York statute in force up to 1901, and in force when the case of Neuchatel Asphalt Co. vs. The Mayor, 155 N. Y., 373, was decided, was one of the weakest statutes of any State in the Union. The present statute is one of the strongest, and is wholly different from those of Indiana and Colorado. The first statute merely postponed the collection of the debt until the statute was complied with. The defendant could plead in abatement, but the plaintiff could, at any time, remedy the fault by complying with the statute.

The new statute is wholly different; no act of the company can open the Courts to it. The statute first prohibits the foreign corporation from doing business: "No foreign corporation * * * "*shall do business* in this State," &c.—(That is an absolute prohibition)—without procuring a certificate "that the business of the corporation to be car- "ried on in this State is such as may be *lawfully* "carried on by a corporation incorporated under "the laws of this State." (That prohibition is just as complete as the prohibition against larceny or forgery.)

Now comes the penalty: "No foreign stock corpo- "ration doing business in this State shall *maintain* "*any action* in this State upon any contract made "by it in this State unless PRIOR *to the making of* "*such contract,* it shall have procured such a certi- "ficate," *i. e.,* the penalty is perpetual. The corporation having once offended, can do nothing to remedy its offense. The New Jersey Courts have not claimed that the contract could be enforced in either New York or Pennsylvania.

The character of a prohibition is not determined by the harshness of the penalty. This New York statute, being a part of the tax law (§181 of the "Tax Law," as amended by Chap. 558, Laws of 1901), and intended to assist in collecting revenues to maintain the government, has all the characteristics of a penal statute, viz.: an absolute prohibition—together with a penalty. This statute is part of the machinery of government, and public policy requires it to be construed liberally in favor of the State, and comity requires every State to aid its neighbor in collecting revenues.

The Constitution of the State of New York prohibits gambling and directs the Legislature to pass appropriate legislation for its punishment. The Legislature passed an act making gambling a felony, except where some other punishment was inflicted. However, for bookmaking on certain race tracks it inflicted a different penalty, permitting the looser to recover back his money, *i. e.*, a civil penalty. We may comment on the disproportion of the punishments for the same offence on different sides of a race track fence; nevertheless, the Court of Appeals has declared in People *ex rel.* Sturgis vs. Fallon, 152 N. Y., 1, that the lesser penalty is exclusive and the law constitutional.

We think that the United States Supreme Court will see at a glance that the New York statute is as much a penal statute as is the Pennsylvania statute. The gravity of the penalty—civil or criminal—does not alter the character of the prohibition.

The Court of Errors and Appeals admits that the Pennsylvania courts have declared that a contract made in violation of its statute is void, although the statute does not, in terms, so declare it, but claims that there is no such decision of the New York Court of Appeals, and, therefore, the New Jersey court takes it upon itself to declare the contract not void.

Permit us to call attention to the fact that the only reason why the Court of Appeals has not de-

termined the void character of a contract entered into in violation of this particular statute is because the law is new (1901) and is so plain that no case has ever arisen under it, and is not likely to arise under it for some time to come. An unambiguous statute is just as binding upon the New Jersey court as a decision of the Court of Appeals.

The old, *weak* New York law is "interpreted" by the new, *strong* law. The interpretation of the old law by Neuchatel Asphalt Co. v. The Mayor (155 N. Y., 373) was "re-interpreted" by the new statute. "Block on N. Y. & N. J. Corporations" (1904) says at page 45d: "The following cases *superseded* by "amendment of 1901: 155 N. Y., 373; 12 Misc., 26; "23 Misc., 520; 86 Hun, 319."

The New York Court of Appeals enunciated the law so plainly so many years ago, and has reiterated it so frequently in citing cases, that no New York lawyer would care to test the new statute in the Court of Appeals. The New York decisions are even more pronounced than those of Pennsylvania.

The case of Tracy v. Talmadge, 14 N. Y., 162 (1856), is a leading case, and has been cited time and time again with approval. The opinion of Selden, J., is an admirable brief, and Judge Comstock says of it in Sacketts Harbor Bank v. Robert Codd, 18 N. Y., 240, at page 244, as follows: "No "case ever received a more careful consideration in "this court and the *principles there laid down are "with us no longer open to discussion.* They were "adopted in the fullest manner in the still later case "of Curtis v. Leavitt (15 N. Y., 9)." The opinion in Tracy v. Talmadge says at page 179: "It has long "been settled that contracts founded upon an ille- "gal consideration, or which contemplate the per- "formance of that which is either *malum in se,* or "PROHIBITED BY SOME POSITIVE STATUTE, *are "void."* * * *

"That a contract by a corporation which it has "no legal capacity to make is *void* and cannot be "enforced, it would seem difficult to deny; * * *

"Prior to the case of East Anglian Railway Com-"pany v. Eastern Counties Railway Company (7 "Eng. Law & Eq., 505), the rule which denied all re-"lief, in equity as well as at law, to any party to an "illegal contract, had been generally applied only "to cases where the contract was either *malum in se* "or *specifically prohibited by statute.*"

This case related to certain bank notes, the issue of which was prohibited, and the court specifically held, at page 180, "that the effect of this upon the "contract was the same as if it had been *specifically "prohibited under a penalty.*" A perusal of this very careful opinion will show that since 1856 there has been absolutely no question in the State of New York that any contract prohibited by statute, whether it have a penalty attached to it or not, the contract is absolutely void as against the guilty party, but may be enforced in favor of an innocent party.

If it were necessary to go further, we have simply to quote from Oneida Bank v. Ontario Bank, 21 N. Y., 490, at page 495, where Chief Justice Comstock said: "THERE IS, NO DOUBT, A PRINCIPLE OF "THE COMMON LAW, THAT ILLEGAL AND PROHIBITED "CONTRACTS ARE VOID, WITHOUT BEING SO EXPRESSLY "DECLARED BY ANY STATUTE. * * *"

And the Court held that those acts (p. 498) which in good morals were innocent acts, were void, stating:" Now, although *they are void*, because "in a form prohibited by law, so that no action can "be maintained upon them, they are still capable of "being used as evidence."

There can be no question whatever that the Court of Appeals of the State of New York has, for nearly fifty years, held in the strongest possible language that any acts prohibited by the Legislature, even so innocent an act as the issuing of time loans by a bank and to which no penalty was attached, are *malum prohibitum* and absolutely void as against the guilty party.

The New Jersey Court seemed to rely upon Neu-

chatel Co. vs. The Mayor, &c., of the City of New York, 155 N. Y., 373 (1898), which was decided under the old statute, and the new statute was passed for the express purpose of overruling that case. A foreign corporation had been doing business in New York without obtaining the required certificate; it filed a mechanic's lien and immediately thereafter obtained the required certificate, and within the required ninety days began an action to foreclose the lien. In other words, it had fully complied with the statute before the beginning of the action. The concluding clause of the old law is as follows: "No foreign corporation doing busi-"ness in this State without such certificate shall "maintain any action in this State upon any con-'tract made by it in this State *until* it shall have "procured such certificate."

At Special Term the Trial Judge held that the prohibition of the statute was absolute. The General Term reversed "upon the reasoning that *by* "*virtue of the concluding clause* of the section a con-"tract, although prohibited, might become, never-"theless, enforceable by an action when the certi-"ficate was procured." The Court of Appeals merely held with the General Term, stating at page 377:

"The inhibition operated upon the remedy, BUT "WAS LIFTED, if the delinquent corporation was able "to procure the issuance by the Secretary of State "a certificate entitling it to do business here. * * * "The concluding clause of Section 15, which pre-"scribed the consequences to follow upon a failure "to comply with the statute, qualified the *absolute* "*nature of the earlier prohibitory declaration,* and, "unless it were given that effect, it could have no "practical operation."

The case of 155 N. Y., 373, depends exclusively on the concluding clause of §15, since repealed.

In other words, this old statute, the weakest of all the statutes of any State, was held not to hold the contract void, by reason of the express wording

of the statute itself. A new law was passed for the express purpose of reversing this condition, and in the plainest kind of English states that the illegal contract having once been entered into can never be enforced, no matter what action may be taken on the part of the foreign corporation, and in so doing, the statute merely goes back to the common law.

We repeat that the law of the State of New York on this point has been so firmly established for so many years, that although nearly four years have now elapsed since the passage of the New York statute in 1901, no case has appeared in any Court to test this principle of law which was enunciated with so much vigor in 1856.

We have searched in vain for any New York case in any court, high or low, that held the principle maintained by the New Jersey Court of Errors and Appeals.

Permit us to suggest, too, that the law laid down by the New Jersey Court is wholly at variance with the text books and encyclopædias.

Am. & Eng. Enc. Law, Vol. 13, title "Foreign Corporations," page 881, states: "If a contract by a "foreign corporation is not *enforceable* in the State "where made, because of noncompliance by the cor- "poration with the statutory conditions precedent "to doing business in that State, it has been held "that the contract *will not be enforced* by the Courts "of another state." At page 880, the Encyclopædia states that where "the statutes imposing conditions "expressly declare that no suit shall be brought on "a contract or obligation made in violation thereof, "there can *be no room for any other construction* "than that the contract will be *void* so far as the "right of the corporation to enforce it is concerned."

The New Jersey Court is wholly in error, therefore, in holding that under the decisions in the State of New York, the contract was not void and may be enforced either in New Jersey or elsewhere, although unenforceable in New York.

The appellants maintain that the contract is not only void, but if not void and only unenforceable, nevertheless it should not be enforced without, any more than within, the limits of the State of New York; that is, the enforcement of a contract is to be governed by the *lex loci contractus* and the friendly States in this Union will not enforce a contract that is unenforceable at home.

"The validity and *enforceability* of a contract by "a foreign corporation, are determined, not by its "charter, but by the law prevailing where the con- "tract is made" Cook on Corporations, §§696-700, page 1673.

It is not a *sine qua non* that there should be a specific case interpreting a specific statute when the principles of law involved are firmly established, and the wording is so plain that any grammar school boy can understand it. The New Jersey Court of Errors and Appeals does not say that the New York statute does not as plainly say that the prohibited contract is *unenforceable* forever in the courts of New York, as any number of decisions of the Court of Appeals could say it. On the question of non-enforceability, the New York statute needs no more interpretation than a primer. The law of comity does not require the Court of Appeals to interpret the command: "Thou shall not sue." It is as plain as the alphabet.

The New Jersey Court states at page 24 (of "Addition"):

"The New York statute does not in terms declare "the contract void, it provides that *no suit on it "shall be maintained* in that State. No case has "been brought to our attention in which the Courts "of New York have held that under the statute as "it now exists, the contract made in that State is "void. • • •

"The New York Legislature had the exclusive "right to declare what consequences should follow "the failure to comply with the law in order to "secure effective control over the business, and

"having in the act provided for no penalty on the "foreign company other than denial of the right "to maintain an action in New York, the Courts of "this State should not penalize the foreign cor- "poration to a greater extent by declaring the "contract void, or by increasing the disability im- "posed by the New York act. State laws have no "extra territorial effect for the enforcing of "penalties."

We deem this to be absolutely bad law. No State has ever presumed to insult her sister States by saying that no suit shall be maintained on a prohibited contract at home or abroad; it would be the height of presumption. Once admitting, as the New Jersey Court does, that the contract is unenforceable in New York, comity requires that it be unenforceable in New Jersey. Besides, New Jersey overlooks the common law and a long line of New York cases wherein prohibited contracts are declared to be void. A prohibited contract is not to be classed with penalties, like fines for illegal fishing. Allen & Co. are not seeking to enforce a New York penalty in New Jersey; the Alleghany Company is seeking to enforce an illegal contract.

New York is more considerate of its sister's rights than New Jersey. In Angel v. Van Schaick, 132 N. Y., 187, a Pennsylvania broker sold real estate in Pennsylvania without obtaining a broker's license. The Pennsylvania statute prohibited the broker from engaging in that business under a penalty of $500 fine. The statute did not say that the broker could not recover his commissions, but the Pennsylvania Courts had held that the broker "cannot recover compensation or com- "mission for his services." The New York Court held that the broker could not recover in the New York courts. It was not a question of void or valid contracts—merely their *enforceability,* and certainly when a New York statute says in plain English that a contract cannot be enforced, a New Jersey Court must follow the New York statute, which is just as binding as a New York decision.

(2) Pleading the Pennsylvania Statute.

(*a*) The position taken by the New Jersey Court of Errors and Appeals that the answer does not contain "allegations which show that the said "*promissory note* was given in pursuance of busi-"ness carried on in the State of Pennsylvania and "not in consummation of a single transaction" is a thunderclap from a clear sky. It was not raised in the court below, nor did it appear in the respondent's "specifications of causes of demurrer," in the brief or argument before the Supreme Court, or the Court of Errors and Appeals. Such a defect, if it exists, could not be raised on appeal by the plaintiff itself (Dohl v. Montana Copper Co., 132 U. S., 264; Girm v. New England Mortgage Security Co., 92 Ala., 135), and it could not, therefore, be raised on the part of the Court. If the defendants' attorneys had had an opportunity to argue that point, they might have pointed out to the New Jersey Court the fallacy of its position. That point has never been raised or argued in any brief.

We think the Justices of the Supreme Court will, in analyzing the two pleas, relating to the New York and Pennsylvania statutes, look in vain for any difference. The attorney who drew the answer supposed he was drawing the pleas exactly alike, and no counsel on either side has ever discovered a difference. The Court of Errors and Appeals says: "The only averment to bring the plaintiff within the "penalty of the act is that at the time of making the "said *note* the plaintiff did business in the State of "Pennsylvania contrary to the form of the statute.

"There is no intimation in this plea, certainly no "allegation, that this note had any connection with "business unlawfully transacted in Pennsylvania, "or that it was given for goods sold and delivered "in Pennsylvania.

"The demurrer *admits that the note was given in "Pennsylvania and it also admits that at the time "the note was given the plaintiff did business in the*

"*State contrary* to its statute, but it does not admit "that of that unlawful business this note was a part. "The admitted averment may be true, and yet the "*note* may have been given for an obligation con- "tracted out of the State of Pennsylvania, and con- "sequently not in violation of its laws."

Permit us to say in answer that, if the action is brought on a promissory note, the giving of the note is the transacting of business just as much as a sale of lumber. It will not be maintained that a corporation takes notes for its amusement, not as a business transaction, and the opinion states that the demurrer admits that the note was given (this one act of business done) in the State of Pennsylvania, while the company "did business" in that State.

However, the opinion misstates the pleading; no plea of the answer anywhere makes use of the word "note" or "promissory note" referred to in the declaration. The words of the answer follow: "That "at the time of the making of the said *promises* "*and undertakings* in the plaintiff's declaration set "forth * * * the plaintiff was a corporation," &c. * * * "And the defendants further aver "that the SAID PROMISES AND UNDERTAKINGS IN THE "PLAINTIFF'S DECLARATION SET FORTH were not made "in the State of New Jersey, but WERE MADE IN THE "STATE OR COMMONWEALTH OF PENNSYLVANIA, and "that it was then and there provided by the statute "of the said State or Commonwealth of Penn- "sylvania in such case made and provided that," &c. * * *

"And the defendants further aver that *at the* "*time* of the making of the *said promises and un-* "*dertakings* in the plaintiff's said declaration set "forth (that the plaintiff had not filed its certificate, "&c.), * * *

"And the defendants further aver that notwith- "standing the said premises the said plaintiff *at the* "*time* of the making of the said *promises and under-* "*takings* in the plaintiff's declaration set forth * * *

"*did business* in the said State or Commonwealth of "Pennsylvania *contrary to the form of the said stat-* "*ute* of the said State or Commonwealth of Penn- "sylvania in such case made and provided.

"And the defendants further aver that by reason "of the premises the said *promises and undertak-* "*ings* in the said plaintiff's said declaration set "forth by the laws of the said State or Common- "wealth of Pennsylvania never were nor are bind- "ing on them, the said defendants, and are of no "force or validity," &c.

The plea does not mention the word "note" at all, yet one would infer from the opinion that no other word was used.

The answer alleges that every promise and every undertaking set forth in the declaration (p. 1 of "Transcript") [that comprehends everything sued upon] were made in the State of Pennsylvania. It would have been idle to have repleaded each and every allegation contained in the declaration and to have alleged that each and every one of these took place in the State of Pennsylvania.

We know of no broader allegation or more correct and concise pleading than the statement that all the "promises and undertakings *set forth in the* "*declaration* were made in the State of Pennsylva- "nia." The word "promises" includes more than the promise contained in a promissory note. It means every promise, direct or contingent, referred to in the declaration; and the word "undertakings" is certainly very comprehensive and would include not only the promissory note, but the purchase and sale that preceded it. No answer has to be more comprehensive than the declaration.

It is the tendency of modern times to simplify pleadings, and it is certainly at variance with modern methods to discourage conciseness. If the defendants had repeated every word contained in the declaration, they could not the more effectually have pleaded that everything sued upon was a Pennsylvania transaction then they have done in al-

leging that "all the promises and undertakings set "forth in the declaration" were made in the State of Pennsylvania in violation of law.

The "promises and undertakings" alleged in the declaration consist not only of the giving of a promissory note, but relate to goods sold and delivered; work, labor and services; money lent; money paid to the use of the defendants; money had and received; interest and forebearance, &c., &c., &c. (p. 1 of Transcript), in the prolix verbiage of common law pleading, which, fortunately, is now unknown in the State of New York. The word "note" is found only in the "notice" which amounts to a bill of particulars only and is not a part of the declaration.

We do not understand the object of that part of the opinion which quotes decisions to the effect that a single sale is not "doing business." That law has been established for so many years that it has become elementary, and every pleading is drawn with respect to decisions so well known. Therefore, when the answer states that the plaintiff "did business," or "was doing business," it uses this form of expression with reference to those decisions, which precludes the idea of "doing business" being a reference to a single act.

At first glance it would seem that the only alleged difference between the pleading of the New York and the Pennsylvania statutes is the use of the words "did business" in one, and "was doing business" in the other. We hope we are mistaken in this. We cannot make ourselves believe that this is the intent of the opinion, for every school boy knows that under the rules of grammar "did business" relates to continuous acts quite as much as "was doing business"; that is, we would say equally, "he did business for many years," and "he was doing business for many years." No correct grammarian, speaking of a single act would say, "he did business in the State of Pennsylvania," if he wished to indicate a single horse trade, instead of the busi-

ness of trading horses. He would say he did one piece of business, or one act of business, or had a business transaction in the State of Pennsylvania, on a particular date. Certainly, when a lawyer uses the words "was doing business," or "did business," he uses them with respect to the statute and controlling decisions which have decided that the words "doing business," and "did business" refers to a number of transactions. If they have this meaning in statutes they have the same meaning in pleadings. The position taken by the New Jersey Courts seems frivolous, and is certainly a misconception of correct pleading. The answer, stripped of all of its verbiage, simply states "that all "acts (all promises and undertakings) set forth in "the declaration and at issue in this suit, were done "in Pennsylvania, and while so done, this foreign "corporation was doing business in violation of "law." "Promises and undertakings" cannot be construed to mean one business transaction or some innocent transaction in some other State.

If the declaration mentions nothing but a promissory note, that promissory note is an act of business, and other transactions which make up its consideration are irrelevant. If the declaration refers to all sorts of transactions which culminated in the promissory note (as is the fact), then all of those transactions are referred to very explicitly in the answer.

When the answer states that "all the promises "and undertakings set forth in the declaration" WERE made in Pennsylvania at the time that the Alleghany Company did business there in violation of law, it is frivolous to intimate that these "prom-"ises and undertakings" MIGHT have been made innocently in New York. The answer says they *were* made in Pennsylvania, not that a "note" was made in Pennsylvania, which might have been given in some innocent transaction. The note itself was the transaction sued on and its consideration had no place in a pleading.

It is a harsh thing to say (but the United States Supreme Court is the protector of the weak against the strong, even against the highest State Courts), and we say it with many apologies, that the New Jersey Court has misstated the plea by assuming that it confines its terms to the word "note" which is not used at all, in order to erect a man of straw and then destroy it. The casual reader of the opinion would get an entirely false idea of the defendant's pleading.

It is respectfully maintained that giving a note is an act of business (admittedly transacted in Pennsylvania), and the answer alleges that while this act of business was being transacted, the plaintiff was doing business (generally) in violation of law. The declaration says nothing about the consideration of the note, and for the answer to have set out the consideration was unnecessary, and bad pleading. It would have been bad pleading to have alleged 1000 business transactions that constituted "doing business" in Pennsylvania during the year that the note was given. How does the Court know from the third defense that "goods sold" were the consideration of the note? As far as this plea goes, it may have been for borrowed money. But the broad language of the answer interpreted by, and referring to, the declaration, covers all possible business transactions, and affirmatively alleges that they all were made in Pennsylvania, while the plaintiff was doing business there illegally. The answer is technically correct, and the New Jersey Court puts words into the mouth of the defendants in order to create a fictitious issue.

(b) The alleged defect in pleading could not be raised for the first time on appeal.

"The rule is of almost universal application that "questions, of whatever nature, not raised in the "Trial Court will not be noticed on appeal, and

"that, too, irrespective of any stipulations to the con-"trary which counsel may enter into"2 Cyc., 661, citing N. Y., N. J. and Penna. cases; Consolidated Traction Co. vs. Behr, 59 N. J., L. 477; 37 Atl., 142; Cumberland Land Co. vs. Clinton Hill Lumber Mfg. Co., 57 N. J., Eq., 627; 42 Atl., 585.

"Objections and questions not raised in the Court "below, and there made the ground of exceptions, "will not be considered by the Appellate Court" Pepper & Lewis' Digest of Decisions (Penna.), Vol. 1, p. 894 and 67 cases cited.

"A question as to the sufficiency of a pleading "cannot be raised for the first time in the Court of "Appeals. It cannot consider a matter or subject "that has not been presented for adjudication and "determination by the subordinate Court. Delaney vs. Brett, 51 N. Y., 78." Bliss Ann. Code, 5th Ed., Vol. 2, p. 2176 *et seq.*, and scores of cases there cited. McGoldrick vs. Willets, 52 N. Y., 612; Whitman vs. Foley, 125 N. Y., 651.

In Dohl v. Montana Copper Co., 132 U. S., 264, it was held that incompetency of a foreign corporation cannot be urged for the first time in the United States Supreme Court.

In Campbell, etc., Co. v. Hiring, 139 Penna. St., 473, the defense alleged that the plaintiff was a foreign corporation and had not complied with the statute. It omitted to say that plaintiff was doing business in Pennsylvania; held insufficient.

This case clearly implies that the *only* insufficiency was in failing to plead that plaintiff was doing business in the State, not that the transaction in question was a part of such "doing business."

See also Finch v. Travelers Ins. Co., 87 Ind., 302.

"Had the answer alleged a want of compliance "with our laws in this respect, it may be that the "defense could have been met and overcome by "proof to the contract. In any event, the question "cannot be raised for the first time in this Court, "and the lower Court put in error upon a matter "not involved in the decree it rendered." Ginn v. New England Mtg. Security Co., 92 Ala., 135.

(c) The plaintiff must stand or fall by "Specifi-"cation of Causes of Demurrer," found on page 15 of "Additions," as follows:

"The second plea is not sufficient in law, because "the *statute* of the State of New York therein stated "does not render the contract made in the State "of New York by a foreign corporation that has "failed to procure the certificate referred to in that "statute, void, but *only forbids their maintaining a "suit in the State of New York upon such contract.*

"The third plea is not sufficient in law, because "the statute of the State or Commonwealth of Penn-"sylvana therein stated does not render the con-"tract made in the State or Commonwealth of Penn-"sylvania by a foreign corporation that has failed "to procure the certificate referred to in that statute "*void,* but simply renders the persons, agents, of-"ficers or employees of such foreign corporation "subject to the fines and punishment mentioned in "said statute."

There is no intimation in these "specifications" that there is any fault with the pleading—else the answer might have been amended. The only fault complained of by the plaintiff is the *statutes* of New York and Pennsylvania.

POINT VIII.

The Fourth Defence--The Merits.

A casual reading of the testimony and exhibits will reveal the perfidy of the Alleghany Company. It should not prevail either in good morals or good law. Its representative was chairman of the creditors' meeting and a member of the examining committee which confirmed Allen & Co.'s statement showing about 7 per cent. in assets, and recommended the acceptance of the offer of 20 per cent.

On the strength of that recommendation the other creditors accepted 20 per cent.

Acting under secret telegraphic instructions, the plaintiff's representative discovered this house in New Jersey standing in Mr. Allen's name (a part of the 7 per cent.) and attached. It was months before this attachment was known; then by a series of false statements by plaintiff and a mistake as to the exact date of the attachment, the four months period expired, and Mr. Allen could not effectually carry out his promise to go into bankruptcy, as promised at the creditors' meeting, and thus prevent any preference among creditors.

The plaintiff's business methods were such as are abhorrent to the American business conscience. Not only in its underhand methods but in its efforts to avoid taxation. Having a nominal residence in North Carolina and a headquarters in Pennsylvania and doing business in other States, it files no certificates required by law, and thus, probably, avoids taxation everywhere.

Recapitulation.

1. A contract prohibited by statute is void when attempted to be enforced by the offending party.

2. It is admitted that the New York statute "provides that no suit on it shall be maintained in that state" (N. Y.) (top p. 24 of "Addition"), *i. e.,* the contract is forever *unenforceable* in New York.

3. A contract unenforceable in New York is unenforceable everywhere (Ford vs. Buckeye State Ins. Co., 6 Bush [Ky.], 133; 99 Am. Dec., 663).

4. The law makes no practical distinction between prohibited, illegal, unenforceable and void contracts, nor between contracts *malum in se* and *malum prohibitum,* especially when sought to be

enforced by the offending party, relying upon the prohibited contract.

5. By a long line of New York decisions a contract prohibited by statute is void.

6. It being admitted that the contract at issue is prohibited by statute, and unenforceable in New York (top p. 24 of "Addition") no New York decision is required, holding that contracts under this specific statute, are void. The statute, being unambiguous and its meaning admitted, is as binding upon the New Jersey Courts as a decision.

7. The principles of law, laid down in New York decisions for nearly a century are as binding on the New Jersey Courts as a specific decision on a specific statute. In New York, prohibited contracts are void.

8. The present New York statute is merely declaratory of the common law; a prohibited contract is unenforceable.

9. The old New York statute was contrary to the common law and 155 N. Y., 373, depended upon the express wording of the statute which did away with the penalty of the common law which declared a prohibited statute to be void.

10. The New York statute of 1901 expressly repealed the old law and was intended to "supersede" 155 N. Y., 373 (Black on N. Y. and N. J. Corporations [1904], p. 45d).

11. The New Jersey Court is in error in enforcing in New Jersey a contract admittedly unenforceable in New York simply because no specific decision has interpreted this specific statute and decreed the contract to be void.

12. The New Jersey Courts go too far in saying that an admittedly unambiguous statute, declaring a contract unenforceable, will be enforced in New Jersey; an unenforceable and void contract are the same.

13. The loose interpretation given to certain weak, prohibiting statutes by certain Colorado, Dakota and United States Courts are bad law and should be overruled. Besides, they have no relation to New York, New Jersey or Pennsylvania statutes, and have never been followed by any New York, New Jersey or Pennsylvania decision. The United States Supreme Court should settle forever the fundamental fact that prohibited contracts are void and are unenforceable in any State or United States Court.

14. The New Jersey Court is in error in reading into the defendants' answer the word "note" and thus predicating an argument on a false premise. The defendants' answer is technically and artificially correct. It alleges that every promise and undertaking set forth in the declaration was made in Pennsylvania, while plaintiff was doing business there illegally. The answer does not mention a note, but includes all acts set forth in the declaration including "goods sold" "money lent," &c., &c.

15. The Supreme Court of New Jersey sustained the demurrers on the ground that defendants' attorney disclaimed an appeal to comity, which disclaimer the attorney repudiated.

The Court of Errors and Appeals sustained the demurrer to the pleading of the Pennsylvania statute by misreading the answer and alleging an infirmity not thertofore raised.

16. The Alleghany Co. could not have sued in New Jersey on this claim, if it had arisen in New

Jersey (Wolf vs. Lancaster, 56 Atl. Rep. [N. J.], 172). It should not, therefore, be permitted to sue in New Jersey if barred from the Courts of New York under rules of comity and the Constitution and Statutes of the United States. The merits and the law are wholly with the defendant and the judgment of the New Jersey Court should be reversed.

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Federal Question!

Pleadings - 24 How 413

Not interpretation of Statute,
but its enforcement.

119 U.S. 615. 607. p. 16 24